

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

IN THE MATTER OF

Docket No. CWA-03-2003-0136DN

DEPARTMENT OF THE ARMY
and the ARMY CORPS OF
ENGINEERS,

Respondent

WASHINGTON AQUEDUCT
5000 MacArthur Boulevard, N.W.
Washington, DC 20315-0220

Facility

FEDERAL FACILITY
COMPLIANCE AGREEMENT

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I. SCOPE AND PURPOSE

The express purpose of the undersigned Parties in entering into this Federal Facility Compliance Agreement ("FFCA" or "Agreement") is to address the discharge of pollutants from sedimentation basins and other facilities at the Washington Aqueduct located in Washington, D.C. and to further the goals of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §§ 1251-1387. It is the express objective of all provisions and obligations of this Agreement to cause the United States Department of the Army Corps of Engineers to come into full compliance with all applicable Federal, state and local laws, regulations and ordinances governing the discharge of pollutants from the Washington Aqueduct into the waters of the United States.

2. This Agreement addresses discharges to waters of the United States from the Washington Aqueduct. The term "Washington Aqueduct" refers to the Dalecarlia and McMillan water treatment facilities and all real and personal property and appurtenances associated therewith. The Dalecarlia and McMillan water treatment plants supply potable water to the District of Columbia, the County of Arlington, Virginia, and the City of Falls Church, Virginia. In addition, the Washington Aqueduct must maintain a continuous uninterrupted supply of water of sufficient pressure in order to provide for the firefighting and other safety needs of its service area. Pursuant to an Act of Congress dated March 3, 1859 (11 Stat. 84), the Chief of Engineers, U.S. Army Corps of Engineers is responsible for the management and superintendence of the Washington Aqueduct. Ownership of the

Washington Aqueduct is under the administrative jurisdiction of the Department of the Army.

II. JURISDICTION

3. The United States Environmental Protection Agency, Region III ("EPA") and United States Department of the Army Corps of Engineers ("Corps") enter into this Agreement pursuant to the Clean Water Act, 33 U.S.C. §§ 1251-1387, and Executive Order No. 12088. This Agreement contains a "plan," as described in Section 1-601 of Executive Order No. 12088, to achieve and maintain compliance with the CWA.

III. PARTIES

4. The Parties to this FFCA are EPA and the Corps.
5. The Parties recognize that the cost to the Corps of operating and maintaining the Washington Aqueduct is not funded through the usual Federal budgetary mechanisms. Instead, the cost of operating and maintaining the Washington Aqueduct is funded through separate Water Sales Agreements between the Corps and the District of Columbia Water and Sewer Authority, Arlington County Government and Falls Church City Government (collectively the "Wholesale Customers"). These Water Sales Agreements obligate the purchasers (i.e., the Wholesale Customers) to pay their proportional shares of the Corps' costs of operating and maintaining the Washington Aqueduct. Thus, the Wholesale Customers bear the full cost of the operation and maintenance, including capital improvements, of the Washington Aqueduct.
6. The Parties recognize that the relationship between the Corps and the Wholesale Customers is governed by a Memorandum of Understanding Between the District of Columbia Water and Sewer Authority, Arlington County, Virginia and the City of Falls Church, Virginia and Between the District of Columbia Water and Sewer Authority, Arlington County, Virginia, the City of Falls Church, Virginia and the Department of the Army, Acting Through the Chief of Engineers (May 5, 1998) (Exh. A). Among various other provisions, the Memorandum of Understanding requires the Corps to submit a proposed agreement with a regulatory or enforcement agency to the Wholesale Customers if (A) such agreement would require the Corps to undertake a capital improvement to, or modify the operation of the Washington Aqueduct; (B) the cost of the capital improvement or operational modification exceeds a specified amount; and (C) the Corps determines that the capital improvement or operational modification does not represent the least costly means of satisfying the permit or statutory requirement which is the subject of the agreement. The Corps may proceed with such an agreement unless the Wholesale Customer Board votes to reject the agreement within thirty days of submission. See Exhibit A, Article IV, Section 2. The Corps agrees to exercise best

efforts, consistent with the Memorandum of Understanding, to obtain from the Wholesale Customers a written acceptance of the terms and conditions of this FFCA.

7. The undersigned representative of each Party to this Agreement certifies that s/he is fully authorized by the Party whom s/he represents to enter into the terms and conditions of the Agreement and to execute and legally bind that Party to it.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

8. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into the waters of the United States by any person except in accordance with other specified sections of the Act, including section 402, 33 U.S.C. § 1342.
9. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the National Pollutant Discharge Elimination System ("NPDES") program for the discharge of any pollutant into the waters of the United States upon such specific terms and conditions as the Administrator may prescribe. Each violation of an NPDES permit, and each discharge of a pollutant that is not authorized by an NPDES permit, constitutes a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).
10. Raw water is taken from the Potomac River, diverted through a screened intake at Great Falls, Maryland into two brick masonry pipes, and sent to the Dalecarlia Reservoir. Additionally, raw water is withdrawn at the Little Falls Dam via the Little Falls Pumping Station and sent to the Dalecarlia Reservoir. To make it drinkable, the water is treated with sedimentation, filtration and disinfection. Initially, there is some natural settling (i.e., no coagulant is added at that point) of sediment in the Dalecarlia Reservoir. Thereafter, the water is treated either at the Dalecarlia water treatment plant (the Dalecarlia sedimentation basins) or directed to the McMillan water treatment plant via the Georgetown sedimentation basins. Currently, aluminum sulfate (commonly called "alum") is used as a coagulant. This results in aluminum and fine sediments settling into the bottom of the basins. The water also is filtered and disinfected. The sediment and aluminum at the bottom of the sedimentation basins must be removed periodically to maintain the function of the sedimentation basins. Historically, the contents of the sedimentation basins periodically have been discharged through pipes to outfalls on the Potomac River.
1. On or about April 3, 1989, EPA issued to the Corps NPDES Permit No. DC 0000019, which authorizes certain discharges of pollutants from the Washington Aqueduct to waters of the United States, including the Potomac River. As issued on or about April 3, 1989, NPDES Permit No. DC 0000019 did not contain numeric discharge limitations for the following pollutants: total suspended solids, total aluminum, dissolved iron, and total residual chlorine.

12. On or about February 4, 1998, EPA issued to the Corps NPDES Permit No. DC 00000329, which authorizes certain discharges of pollutants from point sources within the Washington Aqueduct, other than those covered by Permit No. DC 0000019 issued in 1989, to waters of the United States. As issued on or about February 4, 1998, NPDES Permit No. DC 00000329 did not contain numeric discharge limitations for the following pollutants: total suspended solids, total aluminum, dissolved iron, and total residual chlorine.
13. On or about March 14, 2003, EPA re-issued NPDES Permit No. DC 0000019 ("the NPDES Permit"), which authorizes certain discharges of pollutants from the Washington Aqueduct to waters of the United States, including the Potomac River and supersedes NPDES Permit Nos. DC 0000019 (issued on or about April 3, 1989) and DC 00000329 (issued on or about February 4, 1998). The discharges authorized by NPDES Permit No. DC 0000019 are described in Exhibit B hereto. Unlike superseded NPDES Permit Nos. DC 0000019 (issued on or about April 3, 1989) and DC 00000329 (issued on or about February 4, 1998), the NPDES Permit contains numeric discharge limitations, with respect to various outfalls, for total suspended solids, total aluminum, and dissolved iron.
14. The Parties recognize that a variety of engineering and/or best management practices may be utilized by the Corps to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit. These include, but are not limited to, conveyance (by pipeline or truck) of the discharge to a wastewater treatment facility for treatment, on-site dewatering and other methods.
15. The Parties further recognize that implementation of one or more of the treatment technologies necessary to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit may require construction of pipelines and other appurtenances.
16. The Parties further recognize that implementation of one or more of the treatment technologies necessary to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit may constitute a major Federal action significantly affecting the quality of the human environment.
7. The Parties further recognize that, prior to selecting one or a combination of treatment technologies to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit, the Corps must satisfy its obligations pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq.
18. The Parties recognize that implementation (i.e., full design and construction) of one or more of the treatment technologies necessary to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit may require the Corps to obtain

approvals, permits or some other form of authorization from local and/or federal agencies other than EPA, such as the State Historic Preservation Office or the National Park Service.

V. COMPLIANCE PROGRAM

19. The Corps agrees to take any and all necessary steps within its power to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit as soon as practicable, consistent with its obligations pursuant to NEPA. Such steps will include, but not be limited to, the activities outlined in this section. To the extent the Corps is able to achieve compliance more expeditiously than the timeframes set forth in this FFCA, the Corps shall do so.
20. No later than May 28, 2004, the Corps shall complete an alternatives evaluation and a disposal study. The purpose of the alternatives evaluation and disposal study shall be to identify a range of engineering and/or best management practices that will cause the discharge from the Washington Aqueduct to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit. The Corps shall notify and provide copies to EPA within 30 days of the completion of the alternatives evaluation and disposal study.
21. No later than December 20, 2004, the Corps shall complete and submit to EPA an analysis of the range of engineering and/or best management practices identified by the evaluation and study described in Paragraph 20 that will cause the discharge from the Washington Aqueduct to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit. This analysis may be a free-standing document or may be a draft Environmental Assessment (EA) or draft Environmental Impact Statement (EIS). If the analysis is a free-standing document, the document should be in a format capable of being incorporated into a draft EA or EIS. In preparing this analysis, the Corps shall seek the views of EPA, the National Park Service, United States Fish and Wildlife Service, the National Marine Fisheries Service, the District of Columbia, representatives of the District of Columbia Advisory Neighborhood Commissions, the Wholesale Customers, other interested parties and members of the public. Engineering/best management practices that shall be considered as part of this analysis include, but shall not be limited to, the collection, concentration and transport of sediments from the Georgetown sedimentation basins to the Dalecarlia property, off-site disposal options and other changes of procedure to achieve compliance with the numeric discharge limits set forth in the NPDES Permit.
22. No later than June 3, 2005, the Corps shall identify in a notice to EPA the engineering/best management practices it will implement in order to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit and a schedule for implementing the identified engineering/best management practices as expeditiously as

practicable, consistent with best engineering judgment. The schedule shall include major milestones, including selection of a contractor, preliminary design, and final design, as well as the construction phase. The schedule shall achieve compliance with the numeric discharge limitations set forth in the NPDES Permit at one or more of the sedimentation basins no later than March 1, 2008, and to achieve full compliance with the numeric discharge limitations at all basins no later than December 30, 2009.

23. EPA shall notify the Corps within thirty (30) days of receiving the schedule described in Paragraph 22 above whether EPA agrees that the schedule represents the most expeditious practicable schedule consistent with best engineering judgment. Upon agreement between EPA and the Corps regarding the schedule, the schedule will be incorporated automatically into this FFCA. To the extent the Corps and EPA disagree regarding the schedule described in Paragraph 22 above, the Parties shall utilize the Conflict Resolution procedures described in Paragraphs 37-46 herein. During the Conflict Resolution process, the Corps shall proceed with implementing the engineering/best management practices necessary to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit as expeditiously as practicable but in no case shall the Corps proceed less expeditiously than the the schedule described in Paragraph 22 above.
24. The Corps will exercise its best efforts to satisfy all requirements of NEPA consistent with the timeframes provided herein.
25. The Corps agrees that it shall immediately comply with all effective provisions of the NPDES Permit (including the prohibitions on discharges during the Spring Spawning Season) other than the numeric discharge limitations described in Exhibit B. In addition, until such time as the Corps has fully implemented all engineering/best management practices necessary to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit, the Corps agrees that it shall not discharge through Outfall 002 (discharge from Dalecarlia Sedimentation Basin Nos. 1,2,3 and 4), unless the flow in the Potomac River is equal to or greater than 800 million gallons per day (mgd) as measured at the gauge station at Little Falls (2.64 feet in river elevation). Until such time as the Corps has fully implemented all engineering/best management practices necessary to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit, the Corps agrees that it shall not discharge through Outfall 003 (discharge from Georgetown Sedimentation Basins Nos. 1 and 2) and Outfall 004 (discharge from Georgetown Sedimentation Basin No. 1), unless the flow in the Potomac River is equal to or greater than 1500 million gallons per day (mgd) as measured at the gauge station at Little Falls (2.90 feet in river elevation).
26. Until such time as the Corps has fully implemented all engineering/best management practices necessary to achieve compliance with the numeric discharge limitations set forth in the NPDES Permit, the Corps agrees that it shall increase the duration of the discharge

(which includes a step of an initial draining of flocculent/sediment-laden water and a step that is a final flushing of remaining flocculent/sediment) from Outfalls 003 and 004 to a minimum of thirty-six (36) hours per basin, with each discharge step at a constant rate on an hourly basis. The 36-hour period represents double the 18-hour period that is the current practice of the Corps. The Corps agrees to exercise best efforts, taking into consideration the projected flow rate of the river, its obligations under the Safe Drinking Water Act, and customer demand, to increase the duration of the discharge (which includes both above-described steps) from Outfalls 003 and 004 to 48 hours per basin, with each discharge step at a constant rate on an hourly basis. In addition, the Corps agrees to increase the amount of untreated process water that is used to flush and clean each of the Georgetown sedimentation basins to twice the amount used for each cleaning in calendar year 2001 (which, for Georgetown Basin No. 1, will be a new minimum of 3 million gallons, and for Georgetown Basin No. 2 will be a new minimum of 5 million gallons). Any upset or bypass that occurs at the Washington Aqueduct shall be governed by the upset and bypass provisions of Part II, Section B of the NPDES Permit. Provided that all other provisions of Part II, Section B of the NPDES Permit applicable to a bypass are satisfied, the diversion of waste streams from any portion of the treatment facilities includes an inability to control the timing of a discharge. Any bypass subject to Part II, Section B.3.b. of the NPDES Permit ("Bypass not exceeding limitations") shall comply with the numeric effluent limitations set forth in Exhibit B. Provided that all other provisions of Part II, Section B of the NPDES Permit applicable to an upset are satisfied, an upset may include a discharge that results from the inability to control the timing of a discharge. During any upset or bypass that occurs during the spring spawning season, the Corps shall use best efforts to slow the rate of flocculent/sediment discharge from Outfalls 003 and 004 to seventy-two (72) hours per basin.

27. The Corps agrees that it shall notify EPA, the District of Columbia Department of Health, and the Office of the Superintendent of the Chesapeake and Ohio Canal National Historical Park both orally (which may include by voice message) and in writing (which may include facsimile or electronic mail) at least twelve (12) hours in advance of any discharge from Outfalls 002, 003 and 004. The Corps agrees that it shall notify the District of Columbia Department of Health and the Superintendent of the Chesapeake and Ohio Canal National Historical Park both orally (which may include by voice message) and in writing (which may include facsimile or electronic mail) at least forty-eight (48) hours in advance of any discharge from Outfalls 006 and 007.
28. The Corps' officers, agents, contractors, servants, employees, successors, assigns, and all persons, departments, agencies, firms and corporations in active concert or participation with them shall take all necessary steps to ensure compliance with provisions of the Agreement. As long as this FFCA is in effect, the Corps shall give written notice of this Agreement to any prospective successor in interest and EPA at least ninety (90) calendar days prior to transfer of ownership or operation of the Facility.

29. In any action to enforce this Agreement, the Corps agrees that it shall not raise as a defense the avoidable failure of any of its officers, agents, servants, employees, successors, or assigns, within the scope of their employment, to take all actions necessary to comply with this Agreement. To the extent within its control or the control of its officers, agents, servants, employees, successors, or assigns, as recognized by federal law, the Corps agrees that it shall not raise as a defense the avoidable failure of its contractors, or of any other persons, departments, agencies, firms or corporations in active concert or participation with them, to take all actions necessary to comply with this Agreement.

IV. REPORTING

30. The Corps shall submit a written status report to EPA no later than sixty (60) calendar days after the end of each fiscal year quarter. The status report shall be submitted in addition to any other reporting or certification required under this Agreement or pursuant to law, regulation, or the Permit. The status report shall state and describe the cause of any failure to comply with this Agreement and at a minimum shall include: (1) the deadlines and other milestones which the Corps was required to meet during the reporting period; (2) the progress it made toward meeting them; (3) the reasons for any noncompliance; and (4) a description of any matters relevant to the status of its compliance with this Agreement.
31. Notification to EPA of any noncompliance with any provision of the Agreement or anticipated delay in performing any obligation under the Agreement shall not excuse the Corps' noncompliance or anticipated delay.
32. Unless specified otherwise, when written notification to or communication with EPA is required by the terms of the Agreement, it shall be addressed as follows:

Chief
NPDES Branch (3WP31)
Office of Compliance and Enforcement
Water Protection Division
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103

33. Each notification or communication to EPA shall be deemed submitted on the date it is postmarked, and shall be sent by certified mail, return receipt requested. The Corps shall maintain records of each notification or communication for the duration of the Agreement.
34. All submissions provided pursuant to this Order shall be signed by a duly authorized representative of the Corps who has personal knowledge of the submission's contents.

Each submission shall be admissible as evidence in any proceeding to enforce this Agreement. Each submission shall include the following certification:

"I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

VII. COMPLIANCE WITH OTHER LAWS AND REGULATIONS

35. Compliance with the terms of this Agreement in no way affects or relieves the Corps of its obligation to comply with all applicable requirements of the Act, and regulations promulgated thereunder, or other applicable requirements of Federal, state, or local law.

VIII. RIGHT OF ENTRY

36. EPA, its contractors, and other authorized representatives shall have the right to enter the Washington Aqueduct to conduct any inspection, including but not limited to record inspection, sampling testing, or monitoring they believe is necessary to determine the Corps' compliance with the Agreement.

X. CONFLICT RESOLUTION

37. In the event of any conflict involving violations of this Agreement, US EPA and the Corps shall meet promptly and work in good faith in an effort to reach a mutually agreeable resolution of the dispute.
38. Except as specifically set forth elsewhere in this Agreement, if a dispute arises under this Agreement, the procedures of this Section shall apply. In addition, during the pendency of any dispute, the Corps agrees that it shall continue to implement those portions of this Agreement which are not in dispute.
39. The pendency of any dispute under this Section shall not affect the Corps' responsibility to perform the work required by this Agreement in a timely manner, except that the time period for completion of work affected by such dispute may, at EPA's sole discretion, be extended for a period of time not to exceed the actual time taken to resolve any good faith dispute in accordance with, the procedures specified herein. All elements of the work required by this Agreement which are not affected by the dispute shall continue and be completed in accordance with applicable schedule.
40. The Parties to this Agreement shall make reasonable efforts to informally resolve disputes at the Project Manager or immediate supervisor level. With respect to EPA, "Project

Manager" means the Chief, NPDES Branch, Water Protection Division, EPA Region III, or any duly identified successor. With respect to the Corps, "Project Manager" means the Chief, Planning and Engineering Branch, Washington Aqueduct or any duly- identified successor. If resolution cannot be achieved informally, the procedures of this Section shall be implemented to resolve a dispute.

41. Within fourteen (14) days after any action which leads to or generates a dispute, the Corps shall submit to EPA a written statement of dispute setting forth the nature of the dispute, the Corps' position with respect to the dispute, and the information the Corps is relying upon to support its position. If the Corps does not provide such written statement to EPA within this fourteen (14) day period, the Corps shall be deemed to have agreed with EPA's position with respect to the dispute.
42. Upon EPA receipt of the written statement of dispute from the Corps, the Parties shall engage in dispute resolution among the Project Managers and/or (their immediate supervisors). The Parties shall have fourteen (14) days from the receipt by EPA of the written statement of dispute to resolve the dispute. During this period, the Project Managers shall meet or confer as many times as necessary to discuss and attempt resolution of the dispute. To the extent appropriate, the Project Managers may meet with and consider the views of the Wholesale Customers. If agreement cannot be reached on any issue within this fourteen (14) day period, the Corps may, within ten (10) days after the conclusion of the fourteen (14) days dispute resolution period, submit a written notice to EPA elevating the dispute to the Dispute Resolution Committee ("DRC") for resolution. If the Corps does not elevate the dispute to the DRC within this ten (10) day period, the Corps shall be deemed to have agreed with EPA's position with respect to the dispute.
43. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached pursuant to the foregoing paragraphs in this Section. Following elevation of a dispute to the DRC, the DRC shall have thirty (30) days to unanimously resolve the dispute. The US EPA representative on the DRC is the Director, Water Protection Division, EPA Region III. The Corps' designated member is the Chief, Washington Aqueduct. Delegation of the authority from a Party's representative on the DRC to an alternate shall be provided to the other Party in writing within seven (7) days of delegation.
44. If unanimous resolution by the DRC is not achieved within this thirty (30) day period, the Corps may, within twenty-one (21) days after the conclusion of the thirty (30) day dispute resolution period, submit a written Notice of Dispute to the Regional Administrator of U.S. EPA Region III for final resolution of the dispute. In the event that the dispute is not elevated to the Regional Administrator of U.S. EPA Region III within the designated twenty-one (21) day period, the Corps shall be deemed to have agreed with the original EPA position with respect to the dispute.

45. Within twenty-one (21) days of resolution of a dispute pursuant to the procedures specified in this Section, the Corps shall incorporate the resolution and final determination into the appropriate statement of work, plan, schedule, or procedures and proceed to implement this Agreement according to the amended statement of work, plan, schedule, or procedures.
46. Resolution of a dispute pursuant to this Section of the Agreement constitutes a final resolution of any dispute arising under this Agreement. The Parties shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Section of the Agreement.

XI. FORCE MAJEURE

47. The Corps' obligations under the Compliance Program section of this Agreement shall be performed as set forth in this Agreement unless performance is prevented or delayed by a force majeure event. For purposes of this Agreement, "force majeure" is defined as any event arising from causes beyond the control of the Corps or of entities controlled by the Corps, including but not limited to contractors and subcontractors, which could not be overcome by the due diligence of the Corps or the entities controlled by the Corps, which delays or prevents the performance of any obligation under this Agreement, including acts of God or war, labor unrest, civil disturbance and any judicial orders which prevent compliance with the provisions of this Agreement. Force majeure shall not include increased costs of performance of any activity required by this Agreement, the failure of the Wholesale Customers to fund any activity necessary to achieve compliance with this Agreement or the failure to apply for any required permits or approvals or to provide all information required therefore in a timely manner, nor shall it include the failure of contractors or employees to perform or the avoidable malfunction of equipment.
48. If the Corps is having difficulty meeting its obligations as set forth in this Agreement due to a force majeure event, it shall notify EPA promptly by telephone of any change in circumstances giving rise to the suspension of performance or the nonperformance of any obligation under this Agreement. In addition, within fourteen (14) days of the occurrence of circumstances causing such difficulty, it shall provide a written statement to EPA of the reason(s), the anticipated duration of the event and delay, the measures taken and to be taken to prevent or minimize the time and effects of failing to perform or delaying any obligation, and the timetable for the implementation of such measures. Failure to comply with the notice provisions shall constitute a waiver of any claims of force majeure. The Corps shall take all reasonable steps to avoid and/or minimize any such delay.
49. The burden of proving that any delay is caused by circumstances beyond the control of the Corps shall rest with the Corps.

XII. MODIFICATIONS

50. The requirements, timetable and deadline under this Agreement may be modified upon receipt of a timely request for modification and when good cause exists for the requested modification. Any request for modification by the Corps shall be submitted in writing and shall specify: the requirement, timetable or deadline for which a modification is sought; the good cause for the extension; and any related requirement, timetable, deadline or schedule that would be affected if the modification were granted.
51. Good cause exists for a modification when sought in regard to: a force majeure event; a delay caused, or which is likely to be caused, by the grant of an extension in regard to another timetable and deadline or schedule; a delay caused by failure of a regulatory agency to perform its duties in a timely manner where regulatory action is necessary to proceed with construction and where the Corps has made a timely and complete request for action from the regulatory agency; acceptable scientific data exists which demonstrates that another requirement, deadline or timetable would be adequate to achieve the numeric discharge limitations set forth in the NPDES Permit, protect water quality and achieve the goals of the Clean Water Act; and other event or series of events mutually agreed to by the Parties and constituting good cause.
52. Within twenty-one (21) calendar days of receipt of a request for a modification, EPA shall advise the Corps of its position on the request. If EPA does not concur in the modification, it shall include in its statement of nonconcurrence an explanation of the basis for its position.
53. In the event that the NPDES Permit is modified, through appeal, completion of ongoing consultation between EPA and the National Marine Fisheries Service, or otherwise, EPA and the Corps agree to negotiate modifications to this FFCA to the extent necessary for the Corps to achieve compliance with the discharge limitations in the final NPDES Permit pursuant to a schedule as consistent as practicable with the one set forth in this FFCA.

XIII. FUNDING

54. It is the expectation of the Parties to this Agreement that all obligations of the Corps will be fully funded. The Corps agrees to use every legally available mechanism to seek sufficient funding to fulfill its obligations under the Agreement.
55. Provision herein shall not be interpreted to require obligations or payment of funds in violations of the Anti-Deficiency Act, 31 U.S.C. § 1341. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted within the terms delineated in this Agreement.

If funds are not available to fulfill the Corps' obligations under this Agreement, EPA reserves the right to initiate an action against any other person, or to take any action which would be appropriate absent this agreement.

XIV. GENERAL PROVISIONS

57. The Parties agree that the terms and conditions of this Agreement are enforceable as appropriate by any person pursuant to Section 505 of the Act, 33 U.S.C. § 1365. Terms and conditions of this Agreement changed by an agreed upon modification shall be enforceable as changed. Nothing in this Agreement shall be deemed to waive the sovereign immunity of the United States beyond what is already accomplished in the Clean Water Act.
58. This Agreement was negotiated and executed by the Parties in good faith to ensure compliance with the law. No part of this Agreement constitutes or should be interpreted or construed as an admission of fact or of liability under federal, state or local laws, regulations, ordinances, or common law or as an admission of any violations of any law, regulations, ordinances, or common law. By entering into this Agreement, the Corps does not waive, other than as to the enforcement of this Agreement pursuant to the terms contained herein, any claim, right, or defense that it might raise in any other proceeding or action.
59. If any provision or authority of this Agreement or the application of this Agreement to any party or circumstance is held by any judicial or administrative authority to be invalid, the application of such provisions to other parties or circumstances and the remainder of the Agreement shall remain in force and shall not be affected thereby.

The effective date of this Agreement shall be the date on which it is signed by the last signatory.


61. This Agreement shall be effective if signed in counterparts.
62. In computing any period of time described as "days" herein, all references to "days" refer to "calendar days." The last day of a time period shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday or a legal holiday.

63. This Agreement shall terminate once the Corps has met all of its obligations herein, as determined by the mutual consent of the Parties and evidenced in writing.

Date

June 11, 2003
Date

Jon M. Capacasa, Director
Water Protection Division
US EPA Region III



Thomas P. Jacobus, P.E.
General Manager
Washington Aqueduct
U.S. Army Corps of Engineers

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June 12, 2003
Date

Jon M. Capacasa
Jon M. Capacasa, Director
Water Protection Division
US EPA Region III

Date

Thomas P. Jacobus, P.E.
General Manager
Washington Aqueduct
U.S. Army Corps of Engineers